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June 20, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: June 27, 2005

Case Number: TSO-0254

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter "the Individual") for continued access authorization. This decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the Individual's access authorization should not be restored.

I. APPLICABLE REGULATIONS

The regulations governing the Individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." Under these regulations, an individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). "Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security." *Id.* See generally *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security" test indicates that "security-clearance determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance).

If a question concerning an individual's eligibility for an access authorization cannot be resolved, the matter is referred to administrative review. 10 C.F.R. § 710.9(c). The individual has the option of obtaining a decision by the manager at the site based on the existing information or appearing before a hearing officer. 10 C.F.R. § 710.21(b)(3). The burden is on the individual to present testimony or evidence to demonstrate that he is eligible for access authorization, i.e. that

access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(a).

II. BACKGROUND

The Individual has been employed by a contractor at a DOE facility in a position which requires him to have an access authorization. The Individual was arrested for Driving Under the Influence (DUI) and Possession of Marijuana in July 2004 after an accident. He subsequently reported his arrest to the local security office (LSO).¹ The LSO then conducted a Personnel Security Interview (PSI) with the Individual in September 2004 to inquire about the Individual’s recent arrest. Because the security concerns were not resolved by the PSI, the Individual was referred to a DOE consultant-psychiatrist (the Psychiatrist) for an evaluation concerning his alcohol consumption. The Psychiatrist interviewed the Individual and, in December 2004, issued a psychiatric evaluation report.

In his December 2004 report, the Psychiatrist determined that the Individual suffered from Alcohol Abuse (in early full remission) and had used alcohol habitually to excess. Ex. 12 at 9. The Psychiatrist indicated that the Individual’s problem with alcohol was a condition which caused or may cause a significant defect in judgment or reliability. *Id.* at 10. The Psychiatrist did not believe that the Individual suffered from any type of non-alcohol substance abuse or dependency. *Id.* The Psychiatrist stated in his report that to show adequate evidence of reformation or rehabilitation from his alcohol problem, the Individual could complete one of a number of specified options: (1) attendance at Alcoholics Anonymous (AA) for a minimum of 100 hours with a sponsor with two years of abstinence from consuming alcohol; (2) complete a professionally-led alcohol abuse treatment program (consisting of a minimum of 50 hours) that includes an “aftercare” component plus two years of abstinence or (3) abstain from alcohol for a period of three years in the absence of any treatment program outlined above. *Id.* at 9-10.

In May 2005, the DOE informed the Individual that the Psychiatrist’s report, taken together with the Individual’s 2004 DUI arrest and other alcohol-related traffic arrests, constituted derogatory information that created a substantial doubt as to the Individual’s continued eligibility for an access authorization under 10 C.F.R. § 710.8(h) and (j) (Criteria H and J). May 2005 Letter from Manager, Personnel Security Division, to Individual (Notification Letter). The DOE also cited the Individual’s July 2004 arrest for Possession of Marijuana as derogatory information under 10 C.F.R. § 710.8(k) (Criterion K). Upon receipt of the Notification Letter, the Individual requested a hearing in this matter. The DOE forwarded the request to the Office of Hearings and Appeals (OHA). The OHA Director appointed me to serve as the hearing officer.

A hearing was held in this matter. At the hearing, the Individual was represented by counsel. The Individual offered his own testimony, as well as that of his spouse. The local DOE office presented one witness, the Psychiatrist.

¹ In addition to the 2004 arrest, the record also indicates that the Individual had been arrested in 1989 and 1990 for various alcohol-related offenses. See DOE Exhibit (Ex.) 28 at 6-7, 11; Ex. 27 at 8-10.

III. THE HEARING

The Individual did not dispute the matters giving rise to the Notification Letter. He contends that the security concerns raised by his alcohol abuse and his arrest for possession of marijuana have been mitigated by his rehabilitation from his alcohol problem and the fact that he has never used marijuana or other illegal drugs.

A. The Individual's Wife

The Individual's wife testified that she had been married to the Individual for 33 years. Hearing Transcript (Tr.) at 48. Before June 2004 the Individual would go out by himself once or twice a month on weekends and become intoxicated. Tr. at 48-49. During this time she would express her disapproval of the Individual consuming alcohol and driving. Tr. at 49. After the 2004 arrest she urged him to stop "drinking and driving." Tr. at 49. The Individual then made a commitment to her to stop consuming alcohol totally. Later, the Individual told her "he knew it wasn't any good for him, and he knew that if he kept on drinking and driving, he'd get caught again, that he would lose his job, and he didn't want to do that."² Tr. at 50-51. Since this conversation, the Individual's wife has not seen him consume alcohol or detected the odor of alcohol on him. Tr. at 51. With regard to marijuana usage, the Individual's wife had not detected anything that would indicate that the Individual had ever smoked marijuana or tobacco since June 2004. Tr. at 52.

The Individual's wife testified that after the Individual made the decision to stop consuming alcohol, he had been to clubs where alcohol had been served approximately eight or nine times but she had never observed any evidence that he had consumed alcohol on any of those occasions.³ Tr. at 53. She also noted that since the Individual has ceased consuming alcohol, he has spent more time at home and has been going to church more regularly. Tr. at 61.

B. The Individual

The Individual testified concerning his arrest in July 2004. On the night of that arrest he "was out drinking, and I guess I had a little too much to drink, and I started to go home, and I got to my car, and I just kind of blanked out." Tr. at 11, 29. As a result, he had an accident where his automobile had pushed itself into a number of other automobiles in a parking lot. Tr. at 11, 27-28. He was then arrested for Driving Under the Influence and for possession of marijuana. Tr. at 12. The charge was ultimately reduced to improper lane use. Tr. at 12. As part of an agreement

² The Individual's wife indicates that the discussion leading to the Individual's decision to cease consuming alcohol occurred after his accident and arrest in June 2004. However, the records indicate that the arrest was in late July 2004. *See* DOE Ex. 15 (incident report concerning 2004 arrest). Consequently I believe that this conversation actually occurred in July or August of 2004.

³ When the Individual's wife asked him why he was going to the clubs, the Individual told her he was going "just to socialize a little." Tr. at 54.

made with the court concerning this charge, the Individual agreed to complete the Substance Abuse Traffic Offender Program. Tr. at 12. As part of that program, the Individual went to a facility to be evaluated and was then assigned a mid-level component of that program - the Weekend Intervention Program. Tr. at 14-15. The Individual completed that program in September 2004. Tr. at 13; Individual Exhibit (Ind. Ex.) B. Additionally, the Individual was required to attend a victim impact panel where people gave presentations on how their lives have been impacted by drunk-driving accidents. Tr. at 18. The Individual also completed 10.25 hours of community service. Tr. at 19-20.

The Individual testified that he stopped consuming alcoholic beverages in July 2004. Tr. at 20. Further, his intention is to never consume alcoholic beverages. Tr. at 21. However, when asked whether he ever had a alcohol problem the Individual answered, "[n]ot really, but I guess you could say I have Well, I guess so, yeah, if I think about it somewhat." Tr. at 23. The Individual denied having urges to consume alcohol since his abstinence from 2004. Tr. at 31. Occasionally he will go to locations where alcohol is served but has not consumed any alcohol. Tr. at 31.

The Individual provided the following explanation concerning his possession of marijuana at the accident. "[W]hen I first came to the club and I was getting out of my car, I saw a piece of paper on the ground and picked it up, and it had a little piece of marijuana in there, in the side."⁴ Tr. at 29. After picking up the marijuana cigarette he then placed it in his sock. Tr. at 30. When he first picked up the cigarette he did not know it was marijuana but after examining the cigarette he knew it contained marijuana. Tr. at 30. He does not recall why he kept the marijuana cigarette which was then found by the police when he was arrested. Tr. at 30. When asked if he was trying to conceal the marijuana by putting it in his sock, he answered "I can't say. I smoked cigarettes sometimes -- I'm not a cigarette smoker, but I smoke a cigarette sometimes when I would drink, and I always hid the cigarette package in my pocket (sic) sometimes, and I guess I'm just saying I used it to put it in there." Tr. at 46. The Individual denied ever having used any type of illegal drug. Tr. at 35-36, 43.

C. The Psychiatrist

The Psychiatrist gave his testimony after listening to all of the other testimony at the hearing. He commended the Individual for abstaining from alcohol for a year and a half at the time of the hearing. Tr. at 68. When asked about the Individual's realization that he had consumed too much alcohol during the July incident, the Psychiatrist remarked

Again, a year-and-a-half of abstinence is the overriding accomplishment, yet still today when asked what happened on July . . . , Mr. Jones said, and I quote, "I guess I had too much to drink," end quote, and the key word is "guess," because, in my view, there is no question that on July 24th that Mr. Jones had too much to

⁴ In a 2004 Personnel Security Interview (PSI), the individual identified the marijuana as a "half a joint" and guessed that it was approximately one to one and a half inches long. DOE Ex. 27 at 28.

drink, and I don't think I would go that far out on a limb to say way too much to drink, based on hitting seven cars and running up expenses approaching over \$2,000 worth of damages and registering a blood alcohol level of 0.12.

Tr. at 69. When asked if he thought that the Individual understood that he has an alcohol problem, the Psychiatrist testified,

I hope he does. His wife's support is another plus. She understands, I believe, and hopefully both understand the impact upon their lives of drinking again. What's of concern is that the further out one gets in sobriety, not drinking at all, the more lax the tendency is to think, "Well, one beer is not going to be a problem," and it can be.

Tr. at 70. Nevertheless, the Psychiatrist, based on the Individual's current period of abstinence, believed that the Individual has shown adequate evidence of reformation and rehabilitation. The Psychiatrist reaffirmed this opinion despite the fact that in his report he had recommended a period of abstinence of three years in the absence of treatment. Tr. at 75-76. The Psychiatrist admitted that the Individual's chances for long-term abstinence are reduced in the absence of a treatment program but thought that the Individual's strong will power and the support of the Individual's wife made the chances good that he would be able to maintain his abstinence over the long term. Tr. at 75. The Psychiatrist also pointed out as positive factors that the Individual has been able to go to clubs without consuming alcohol and that his social activities have shifted more to church activities. Tr. at 81. When asked to estimate the chances for the Individual relapsing the Psychiatrist noted studies that indicate that people who have two DUI arrests have a 90 percent chance of having a life-long alcohol problem but that his current period of abstinence "goes a long way towards putting him in the ten percent [that will not have a life-long problem with alcohol or will relapse]." Tr. at 76; *see* Tr. at 78. The Psychiatrist further elaborated, testifying that he thought that it was "more likely than not" that the Individual was in the ten percent of people who would not relapse. Tr. at 79.

With regard to the Individual's arrest for possession of marijuana, the Psychiatrist indicated that he thought that the incident amounted to a temporary lapse in judgment. Tr. at 80. Based on his review of the Individual's employment random drug tests and the fact that marijuana has a long half-life and stays detectable in the body for a long time, he concluded that the Individual did not smoke marijuana or use other illegal drugs.⁵ Tr. at 79-80.

IV. STANDARD OF REVIEW

Under Part 710, the DOE may suspend an individual's access authorization where "information is received that raises a question concerning an individual's continued access authorization eligibility." 10 C.F.R. § 710.10(a). After such derogatory information has been received and a

⁵ The Individual's random drug tests are described in the Psychiatrist's report and were all negative. *See* Ex. 12 at 30-31.

question concerning an individual's eligibility to hold an access authorization has been raised, the burden shifts to the individual to prove that "the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest." *See* 10 C.F.R. § 710.27(a).

Derogatory information includes, but is not limited to, the information specified in the regulations. 10 C.F.R. § 710.8. In considering derogatory information, the DOE considers various factors including the nature of the conduct at issue, the frequency or recency of the conduct, the absence or presence of reformation or rehabilitation, and the impact of the foregoing on the relevant security concerns. 10 C.F.R. § 710.7(c). The ultimate decision concerning eligibility is a comprehensive, common sense judgment based on a consideration of all relevant information, favorable and unfavorable. 10 C.F.R. § 710.7(a).

V. ANALYSIS

A. Security Concerns

The derogatory information concerning Criteria H and J centers on the Individual's alcohol problem. Criterion H concerns conduct tending to show that the Individual has "an illness or mental condition of a nature which, in the opinion of a psychiatrist or licensed clinical psychologist, causes or may cause, a significant defect in judgment or reliability." 10 C.F.R. § 710.8(h). Criterion J concerns conduct indicating that the Individual has "been, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse." 10 C.F.R. § 710.8(j). Criterion K references information that indicates that a person has "trafficked in, sold, transferred, possessed, used, or experimented with a drug . . . listed in the Schedule of Controlled Substances (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician" 10 C.F.R. § 710.8(k).

It is beyond dispute that an individual suffering from an alcohol problem raises security concerns. *See, e.g., Personnel Security Hearing, Case No. VSO-0243*, 27 DOE ¶ 82,808 (2002). Given the Psychiatrist's finding that the Individual suffered from alcohol abuse, the local security office had more than sufficient grounds to invoke Criteria H and J. With regard to Criterion K, the record is undisputed that the Individual was arrested for possession of marijuana and has admitted to possessing marijuana. This incident involving an illegal drug raises significant security concerns. *See generally Personnel Security Hearing (Case No. VSO-0503)*, 28 DOE ¶ 82,868 (2002) Thus, the only issue remaining is whether these security concerns have been resolved.

B. Mitigating Factors

1. Alcohol Abuse

The Individual has provided evidence that indicates that his last use of alcohol occurred in July 2004. Further, the Psychiatrist has provided expert testimony giving his opinion that the Individual has shown adequate evidence of rehabilitation and reformation. However, an expert's finding that a person has shown adequate evidence of rehabilitation and reformation from an alcohol problem is not in itself solely determinative as to whether the associated security concerns have been resolved. *Personnel Security Hearing, Case No. TSO-0209, slip op. at 6-7* (May 15, 2006) ("the determination as to whether [medical] evidence is "adequate" to warrant the restoration of a security clearance is one to be made by DOE officials, including the hearing officer, not by a consultant psychiatrist."). A key component in the determination of whether the Individual has mitigated the security concerns raised by his alcohol problem is an assessment of the likelihood that the individual will relapse and again become a security vulnerability.

When asked his opinion as to the probability that the Individual would not relapse, the Psychiatrist testified that it was "more likely than not." On the surface this would indicate that the Individual's chance of relapsing, in the worst case, would be approximately 49 percent. Other facts of this case cause me grave concern about the long-term risk of relapse for the Individual. First, I do not think the Individual has fully accepted the fact that he had an alcohol problem. His answer in reply to a question as to whether he believed he had an alcohol problem is illustrative of my concern: "[N]ot really, but I guess you could say I have . . . Well, I guess so, yeah, if I think about it somewhat." Tr. at 23. A person who does not fully accept his alcohol problem is not in a good position to recognize when he is in danger of relapsing. Second, the Individual has not sought any type of treatment for his alcohol problem other than self-control. The classes he attended pursuant to his July 2004 arrest did not seem to be aimed at treatment and were apparently required of the Individual by the court. Third, the Individual's alcohol abuse problem seems to be of significant duration as evidenced by the earlier arrests for DUI in 1989 and 1990. Lastly, despite the support the Individual has received from his wife, there appears to be no evidence that the Individual has a support system, outside of his wife, that could help him in the future to avoid alcohol. I have weighed this against the Individual's significant time of abstinence, the support he gets from his wife, the changes he has made in his life and the testimony of the Psychiatrist. Given the above evidence, I do not think the security concerns have been mitigated despite the Individual's current evidence of rehabilitation from his alcohol abuse. In my judgment, the risk of relapse, given the Individual's current progress, is high enough that I cannot conclude that the security concerns are sufficiently mitigated.

2. Marijuana Possession Arrest

There is no evidence before me that indicates that the Individual has used marijuana. Nevertheless, assuming the Individual's account is accurate, the Individual's picking up and retaining a marijuana cigarette showed incredibly poor judgment. By keeping the marijuana, he

voluntarily violated federal law and Department of Energy policy against involvement with illegal drugs. It is also worrisome that the Individual chose to place the marijuana in his sock. Keeping the cigarette in his sock would be consistent with an attempt to conceal the fact that he had it in his possession. The explanation offered at the hearing – that he used to keep his tobacco cigarettes in the same location – was not offered at the time of the September 2004 PSI. Nevertheless, I judge the Individual's testimony on this issue to be credible. Further, there seems to be no other evidence of involvement with marijuana prior to or since the accident. As such, this seems to be a single incident of poor judgment. Given the solitary nature of this incident and the fact the Individual does not appear to be a user or seller of marijuana, I find that the security concern concerning the marijuana arrest has been resolved.

VI. CONCLUSION

As explained above, I find that the security concerns related to the Individual's prior history of alcohol misuse (Criteria H and J derogatory information) have not been mitigated. I do find however that the marijuana arrest concern (Criterion K derogatory information) has been mitigated. In light of the unresolved Criteria H and J concerns, I cannot conclude that restoring the Individual's access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Consequently, the Individual's access authorization should not be restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Richard A. Cronin, Jr.
Hearing Officer
Office of Hearings and Appeals

Date: June 20, 2006